No. 3791.

United States Circuit Court of Appeals For the Ninth Circuit

ASMA RUBIAZ,

Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT & POWER COMPANY, a Corporation, TUCSON RAPID TRANSIT COMPANY, a Corporation, THE INTERNATIONAL TRUST COMPANY, a Corporation, and EDWIN F. JONES, as Receiver,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Arizona

Messrs RICHEY & RICHEY and Messrs. MOORE & FRAWLEY; Tucson, Arizona,
Attorneys for Appellant.

Filed this ..... day of January, 1922

.....

Clerk of the United States Circuit Court of Appeals, Ninth Circuit.

Service of two copies of within Brief of Appellant is hereby acknowledged this.....day of January, 1922.

.....

Attorney for Appellee, Tucson Rapid Transit Company.

.....

Attorneys for Appellee, The International Trust Company.

.....

Attorney for Appellee, Tucson Gas, Electric Light & Power Company.

.....

Receiver.

No. 3791.

United States Circuit Court of Appeals For the Ninth Circuit

ASMA RUBIAZ,

Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT & POWER COMPANY, a Corporation, TUCSON RAPID TRANSIT COMPANY, a Corporation, THE INTERNATIONAL TRUST COMPANY, a Corporation, and EDWIN F. JONES, as Receiver,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Arizona

Messrs RICHEY & RICHEY and Messrs. MOORE & FRAWLEY, Tucson, Arizona,
Attorneys for Appellant.

Filed this ..... day of January, 1922

.....

Clerk of the United States Circuit Court of Appeals, Ninth Circuit.

No. 3791.

United States Circuit Court of Appeals For the Ninth Circuit

ASMA RUBIAZ,

Appellant,

vs.

THE TUCSON GAS, ELECTRIC LIGHT & POWER COMPANY, a Corporation, TUCSON RAPID TRANSIT COMPANY, a Corporation, THE INTERNATIONAL TRUST COMPANY, a Corporation, and EDWIN F. JONES, as Receiver,

Appellees.

BRIEF OF APPELLANT

STATEMENT OF CASE

(For brevity, throughout this brief the Tucson Rapid Transit Company is referred to as "Transit Company," the Tucson Gas, Electric Light & Power Company as "Light Company," and the International Trust Company as "Trustee.")

March 15, 1906, the Transit Company executed a certain deed of trust on all its property, real, personal and mixed, including income and after acquired property, to Trustee, in trust to secure an authorized issue

of $300,000 of bonds. Under this authorization $114,-800 of bonds were issued shortly thereafter, and are now outstanding and unpaid. All bonds mature March 15, 1928, and bear interest at the rate of 6 per cent, payable semi-annually. (Transcript page 97). By the provisions of the deed of trust, if the Transit Company failed to pay any interest coupons when due and payable and such default continued for a period of 60 days, the Trustee might, in writing, notify the Transit Company of such default, and if the same continued for 30 days after the receipt of such notice, the Trustee might, at his election, enter upon and take possession of the mortgaged premises (transcript, page 67-68). Part of the first installment of interest, due August 15, 1906, was paid, and no interest has been paid since that date. (Transcript, page 98). But no action has ever been taken by any individual bondholder, nor by the Trustee, except as hereinafter stated.

This deed of trust was filed as a realty mortgage April 23rd, 1906, and fixed a lien on the realty, but was ineffectual and inoperative as to the Transit Company's personal property. Paragraph 3282 of the Revised Statutes of Arizona, 1901, in force at the date of the execution of the deed of trust, and still in force, reads as follows:

> 3282. (Sec. 23.) No chattel mortgage shall have any legal force or effect except as between the parties, unless the residence of the mortgagor

> and mortgagee, the sum to be secured, the rate of interest to be paid, when and where payable, shall be set out in the mortgage; and the mortgagor and mortgagee shall make affidavit that the mortgage is bona fide and made without any design to defraud or delay creditors, which affidavit shall be attached to such mortgage.

The acknowledgments of good faith were not made to the deed of trust as originally filed, but on August 30, 1918, such acknowledgments were made and the instrument filed as a chattel mortgage. (Transcript, page 97).

On February 10, 1915, the Light Company loaned to the Transit Company the sum of $25,000, on March 20, 1916, the sum of $15,000, and on November 30, 1917, the sum of $20,000, taking in each instance, the unsecured, demand note of the Transit Company. (Transcript, page 2). These notes bore interest at the rate of 8 per cent per annum, but no interest was ever paid thereon. (Transcript, page 6).

June 25, 1918, appellant, Asma Rubiaz, was given judgment in the Superior Court of Pima County, Arizona, against the Transit Company in the sum of $4,552.75. This judgment was for personal injuries received by appellant while a passenger on one of the Transit Company's cars and bears interest at the rate of 6 per cent per annum from date of rendition until paid. The Transit Company appealed from this judgment to the Supreme Court of Arizona.

On February 20, 1919, and while the above case was still pending in the Supreme Court of Arizona, the Light Company instituted action against the Transit Company in the United States District Court for the District of Arizona. In its complaint it set up the deed of trust, and non-payment of interest thereunder, appellant's judgment, the execution of the demand notes, demand for payment and refusal, that the Transit Company was insolvent, and prayed judgment for the amount of said notes and interest and

> That this Honorable Court take the said property of the said defendant company into its possession and that the creditors of the defendant, or any and all persons having claims or demands against said defendant, be required to present the same, and that said claims be ascertained and determined, and that the court fully administer the fund obtained and the assets of the said defendant company and that the said assets be marshalled and the respective lien or liens and priorities existing therein be ascertained and that the court enforce and decree the rights, liens and equities of all creditors or persons having claims upon or against the defendant as the same may be finally ascertained by the Court; and that for the purpose of preserving the property of the said defendant a receiver be appointed with power to collect all of the assets of the defendant company

and that authority to run and operate said street railway system and to collect and receive all moneys due and apply the income thereof under the direction of the Court and for such period as the Court may order, and that for the purpose of protecting and preserving the property of the said defendant company from being sacrificed under proceedings liable to be taken and which might prejudice the same, and that temporarily and pending the suit an injunction might issue against the defendant and all persons claiming to act by, through or under it, and all other persons, restraining them and each and all of them from interfering with the Receiver taking possession of and operating the property. And that plaintiff have such other and further relief as to the Court may seem just and proper, together with its costs in this behalf expended (Transcript, page 7-8).

On the same day the Transit Company filed its answer to this complaint, admitting all the allegations of the complaint and joining in the prayer for a Receiver, and on February 21, 1919, the Court appointed Edwin F. Jones as Receiver, with full power to take possession of, manage, operate and control "all of the property and assets of every kind and description of the said defendant, the Tucson Rapid Transit Company," and it was further ordered

That the said Receiver, out of the money which

> shall come into his hands by the operation of said railroad or otherwise proceed to make payments as follows: He will pay all current expenses incident to the operation of said railroad and the administration of his trust; he shall pay all amounts now legally due or that shall hereafter become due for taxes on any of the property over which he is appointed Receiver, and any other or further funds which may come into his hands he shall hold subject to the supervision of this Court (Transcript, page 13).

Also an injunction was issued restraining interference by anyone with the Receiver's possession. The Receiver qualified at once and has continually managed and controlled the Transit Company's property and business from that time to the present.

On February 18, 1920, the Supreme Court affirmed the judgment of the lower court in appellant's action against the Transit Company, and awarded appellant costs on appeal in the amount of $106.00 (transcript, page 39).

On April 1st, 1920, appellant, by leave of court, filed a petition in intervention in the receivership proceedings. There was, on this date, April 1, 1920, the sum of $8,368.77 (transcript, page 144) on deposit in the Arizona National Bank of Tucson, Arizona, to the credit of the Receiver, representing the net income from the operation of the road, after deducting

payment of the costs and expenses of running the business (transcript, page 42).

In her intervening petition, after setting up her judgment and its affirmance and that there was sufficient net income in the hands of the Receiver to pay the said judgment, interest and costs, appellant prayed:

> And this intervenor says said judgment is a first and prior lien on the personal property of said The Tucson Rapid Transit Company, a corporation, within the County of Pima, State of Arizona, including said sum of money in the hands of said Receiver, and prays an order of the Honorable Court conferring the same as such first and prior lien and for the further order for the immediate payment thereof by said Receiver.
>
> And the intervenor prays for such further or other orders respecting said claim as may seem to the Honorable Court equitable, proper and necessary under the fact, and so as in duty bound will ever pray (transcript, pages 32-33).

Revised Statutes of Arizona, 1913, provides in paragraph 3634 as follows:

> 3634. A judgment against any railway corporation, or street railway corporation or copart nership, for an injury to any person or property, shall be a lien within the county where recovered on the property of such corporation, and such lien

> shall be prior and superior to the lien of any mortgage or trust deed executed after this sec tion takes effect.

All the property of the Transit Company is located in Pima County, Arizona.

On the 27th day of August, 1918, the holders of approximately 90 per cent of the outstanding bonds and interest coupons presented the unpaid coupons to the Trustee and demanded payment. Payment was refused, and, the default continuing for a period of 60 days, the Trustee notified the Transit Company of such default, and the Transit Company, for a period of more than 30 days after such notice, defaulted in the payment of said interest coupons and all thereof, and has not paid the same nor any part thereof.

April 27, 1920, the Trustee, under leave of court, filed its petition in intervention wherein it set up the deed of trust, non-payment of interest thereunder, except as heretofore set up, demand on Trustee by coupon holders, and notice of such demand, as set out in the preceding paragraph of this brief, and prayed:

> That the lien or liens of complainant, and under and by virtue of the said indenture of trust, be declared prior and superior to any and all other claims or liens of any person whomsoever upon all of the property, rights, moneys, franchises, profits, income, and all property of what-

soever kind or description, of the said Tucson Rapid Transit Company, and that all moneys that have been derived from the operation of the property, over and above the necessary expenses of operation and the expenses of the receivership, and that may hereafter be derived from such operation, be paid unto it to apply upon the aforesaid indebtedness, and that the Receiver hold all property of defendants for complainant.

That complainant do have such other and further relief as shall be adequate, and proper and just in the premises (transcript, pages 107-108).

The answer of the Light Company to appellant's petition sets out the deed of trust, denied that appellant's lien was a first or prior lien on the personal property or the sum of money in the hands of the Receiver, or any property of the Transit Company, but that "the lien of the said deed of trust is the first and prior lien upon all the property and assets of whatever kind or character of the said" Transit Company. The answer also alleges:

* * * that the franchise of the City of Tucson granted to the Tucson Rapid Transit Company requires said company, whenever paving shall be ordered upon a street where the railroad of said company shall be operated, that said company shall pave between the rails on said street or streets, and that, in the event it shall fail so to do, its franchise shall be forfeited; that the City

of Tucson has ordered that Stone Avenue, in the said City of Tucson from the railroad tracks of the Southern Pacific Company on said Stone Avenue, north to Third Street shall be paved, and that, as plaintiff is advised and believes, the contract for the paving of said street has been let, and said paving is about to be commenced (transcript, page 106).

The prayer for relief is as follows:

> WHEREFORE, plaintiff prays that the intervenor do have and recover nothing upon her complaint and petition in intervention; that the lien of the said International Trust Company be declared the first and paramount lien upon all of the property and assets of the Tucson Rapid Transit Company; that. to the end that the creditors of the Tucson Rapid Transit Company may have their rights preserved in said property, that the Receiver herein be authorized and directed to apply the moneys now in its hands to the necessary paving of the aforesaid street, that the franchise of the Tucson Rapid Transit Company be not forfeited and its assets preserved, and for such other and further relief as to the Court may seem meet and equitable in the premises (transcript, pages 107-108).

The Receiver's answer to appellant's petition requests the Court for instructions as to the disposition

of the funds in his hands, and that the Court determine the priorities.

The answer of the Transit Company to appellant's petition sets out the deed of trust, default therein and notice of default, admits the existence of appellant's judgment and that it is wholly unpaid, denies that said judgment is a prior lien on the personal property of the Transit Company or the sum in the hands of the Receiver, makes the same allegation relative to paving as contained in the Light Company's answer, and prays:

> 1. That the lien or liens of the International Trust Company, Trustee, under and by virtue of the said indenture of trust, be declared prior and superior to any and all other claims or liens of any person, and of the claim or lien of the said Asma Rubaiz upon all property, property rights, moneys, franchises, and all properties of whatsoever kind and description of the said defendant.
>
> 2. That the Court direct the money now in the hands of the Receiver be spent for the purpose of doing said paving in order to improve the security of the said trustee (transcript, page 125).

May 11, 1920, appellant moved to dismiss the Trustee's petition in intervention, and moved to strike the the answer of the Light Company, and the answer

of the Transit Company to her petition in intervention, stating as one of her grounds:

> * * * said answer shows on its face that said The Tucson Gas, Electric Light & Power Company is colluding with the said The International Trust Company, intervenor, and Tucson Rapid Transit Company, above named defendant, to have the property and assets of said Tucson Rapid Transit Company used for the protection, preservation and enhancement of the value of the security of the mortgage of the said The International Trust Company, and to defeat the claim and lien of Intervenor Asma Rubiaz (transcript, page 140).

The Receiver's answer to the complaint in intervention of the Trustee sets up a necessity for paving and prays that the Court determine all priorities to the fund in his hands.

Neither the Transit Company nor the Light Company answered the Trustee's intervening petition.

Arguments were had and briefs submitted to the Court and on June 24, 1920, the Court directed the Receiver to pay the appellant the sum of $960.05, this being the amount received by him from the operation of the Transit Company from April 1, 1920, to April 27, 1920; the order concludes: "further action of the Court on the matter of the Rubiaz claim in this cause will be taken under advisement." (Transcript, page

147). This sum was paid to appellant by the Receiver.

The Court had the case under advisement from the last mentioned date until the 14th day of April, 1921, when the memorandum opinion was handed down denying appellant's right to any funds in the hands of the Receiver and directing that the money be used in paving between the rails, and it is from this order that appellant prosecutes her appeal.

SPECIFICATION OF ERROR

I

That the Court erred in finding the law against this intervening petitioner.

II

That on the facts shown by the pleadings, records and documents in this case this intervening petitioner is entitled to a finding and decree in her favor; whereas the Court found as a matter of law against her.

III

That the finding and decree of the Court are against the law and equity of the case and against the facts and contrary to the same.

IV

That the Court erred in holding that this intervening petitioner did not have a lien on the net income in the hands of the Receiver, by virtue of the interven-

ing petitioner's judgment and the laws of the State of Arizona.

V

That the Court erred in finding that the filing of the petition in intervention by said Asma Rubiaz did not create a lien, in favor of said intervenor, on said net income then in the hands of said Receiver.

VI

That the Court erred in not directing the Receiver to pay over to said intervening petitioner an amount necessary to satisfy her claim in accordance with the prayer of her petition in intervention.

VII

That the Court erred in ordering a diversion of the net income in the hands of the Receiver from the payment of said intervening petitioner's claim.

ARGUMENT

May it Please the Court:

All the specifications of error are so closely interrelated that any argument in support of one necessarily applies to all, making it impossible to discuss them individually. Our argument, therefore, may be considered as applying to each specification.

A. THE EQUITIES

We respectfully urge that if appellant was wholly

wrong in her legal points, and we believe she is not, the equities alone would demand prompt payment of her judgment.

The learned District Judge would seem, from his memorandum opinion (transcript, pages 174-175), to hold that Equity Rule 37 estopped appellant from raising any point of collusion or other equitable considerations. This we do not conceive to be the true construction of that rule. The original proceeding may have been most proper, but the actions of the parties to the proceeding, and their conduct subsequent to the appointment may show, or create, decided equities in favor of a claimant.

In the present case, for example, the original complaint set up appellant's judgment, the deed of trust and default thereunder, that the company was insolvent, the notes held by complainant and non-payment thereof, and prayed for a receiver to prevent attachments and dismemberment of the system. Had we asked that the receiver be dismissed they could probably have shown that the Transit Company did not have sufficient funds to pay our judgment, that execution to the amount of the judgment would result in the stoppage of transit for lack of the equipment seized, and resultant atrophy and dismemberment. And, if asked, we would have had to admit that we purposed to take out execution and satisfy our judgment. Obviously had the court denied our supposititious application, it could not be argued that he had

abused his discretion. Therefore the propriety of the main proceeding may be such as to leave no alternative to a claimant but to intervene, although he may feel certain that the entire proceeding lacks every element of good faith and is directed solely against him. And his intervention, we submit, does not destroy his equities, nor work a denial to him of equitable principles.

It is our contention that this entire proceeding has but one objective and that is to harrass, delay, and prevent, if possible, appellant's collection of her judgment, and that the Transit Company, Light Company and Trustee are united in this common purpose.

First, we desire to direct the Court's attention to the unity of counsel. When appellant brought action against the Transit Company in the State Court the company was represented by Kingan & Campbell (transcript, page 34). While this case was pending in the Supreme Court of Arizona, and while the same firm still represented the Transit Company on appeal, Kingan & Campbell, as attorneys for the Light Company, brought this action against the Transit Company (transcript, page 8), which created the anomalous situation of their defending a client in one court and prosecuting it in another. However, another attorney appeared as counsel for the Light Company in the receivership proceedings. This dual representation may be explained by a plea of acknowledged debt and present unity of interest in a receivership.

But the possibility that a conflict of interest might not later arise in the course of the receivership cannot be explained away, except on the theory that the interests of both were so indissolubly bound as to create the necessity for continuing unity. And unless Kingan & Campbell were absolutely sure of this continuing interdependence they would never, we feel sure, have brought action against their client.

But when the Trustee intervened we have another claimant looking for the satisfaction of his debt from the same assets that the Light Company was compelled to look to. Surely there were great potentialities for conflict here. Not only as to conflict between the two claimants, but between either or both claimants and the company whose property would be required to yield up the necessary wherewithal. Nevertheless we find this client also turning to Kingan & Campbell for representation and find this firm so assured of unity of interest in their three clients that they consent to, and do, appear for the Trustee also (transcript, page 102). This is not written in criticism of that firm—quite the opposite. We know them well enough to realize that they would never have accepted these different employments, so fraught, ordinarily, with such dangerous possibilities, unless they knew that all authority came from a single source and that the same power directed all three.

And this common unity of interest is shown in several other ways. Both the Light Company and the

Transit Company have the same general manager. We find Frank E. Russell, as general manager of the Transit Company, making affidavit of good faith to the deed of trust (transcript, page 95), and as general manager of the Light Company verifying its petition against the Transit Company (transcript, page 8). We find that the Light Company and Transit Company are "allied" companies, and so shown on the latter's books (transcript, page 164). We find in that part of the Receiver's report shown on page 164 of the transcript, that there are two companies "allied" with, or to, the Transit Company, viz, the Light Company and the Federal Light & Traction Company, AND THAT THE INTEREST ON THE BONDED INDEBTEDNESS IS CARRIED, NOT AS DUE TRUSTEE, BUT AS DUE THE FEDERAL LIGHT AND TRACTION COMPANY. Is it not a fair inference that the Federal Light & Traction Company is the real party in interest as to this deed of trust, not the Trustee, and that the real alignment is the three allies, Light Company, Transit Company and Federal Light & Traction Company, versus appellant? The name of the last mentioned company is significantly comprehensive.

The Trustee, Light Company and appellant are the sole creditors; there are no others. The receivership has now lasted for about three years and not a claim has been filed. The company's balance sheet (trans-

cript, page 164) also establishes this fact and shows no outstanding accounts.

Let us examine the situation prior to June, 1918, the time appellant secured her judgment in the state court. The interest coupons were then twelve years in arrears, yet not a single bond holder brought action, nor did the Trustee take any steps to disturb the mortgagor. The Light Company in 1915, 1916 and 1917 loaned the Transit Company sums aggregating $60,000.00 without an atom of security and in the face of the mortgage and default thereunder. The lender did not even ask for a second mortgage, leaving it open for their debtor at any time, if it wished, to pledge everything it owned to still a third lender, subject only to the first mortgage. And while the notes called for eight per cent interest, the lender must have made the loans without any expectation of receiving interest. When the first loan was made the Transit Company was nine years' in default in its trust deed coupons. Nor did the Transit Company fail to run true to form. Neither principal nor interest was paid. Still, the Light Company did nothing (although its first note was over four years old) until appellant secured her judgment.

But this acquiescence by these two creditors did not arise from pure altruism. The last report of the receiver, April 4, 1921, shows that he then had on hand as net income, over cost of operation, the sum of $11,756.19 (transcript, page 149). To this should

be added the sum of $960.05 previously paid appellant under order of court, making a total of $12,716.24 net earnings in a little over two years, or about $6,000.00 net per year. If we added the receiver's salary and costs of receivership to this it would be considerably augmented. Besides, in addition to this income, the Transit Company buys its power from the Light Company (transcript, page 24), which means an income to the latter company of about $500.00 per month (transcript, page 43). And this situation was quite satisfactory to both Trustee and Light Company prior to appellant's judgment.

But this judgment introduced a new element. Default in interest to the extent of over $70,000.00 had not disturbed either bondholders or Trustee, nor had the dept of $60,000.00 and accrued interest disturbed the Light Company. But appellant's judgment of less than $5,000.00 disturbed both of them. Appellant was not one of the "allies," and the other two creditors were galvanized into action. An appeal was taken to the Supreme Court of Arizona and steps taken to anticipate an adverse ruling. In August, 1918, affidavit of good faith was made to the deed of trust to give it validity as a chattel mortgage, and the same month ninety per cent of the owners of the outstanding bonds, a suspicious unanimity, presented their coupons and demanded payment. February, 1919, the Light Company brought action on its notes and asked for a receiver. On the same day the Tran-

sit Company admitted the indebtedness and joined in the prayer for a receiver, and the receiver was appointed the following day. But it is most significant that NO JUDGMENT WAS EVER ENTERED AGAINST THE TRANSIT COMPANY IN FAVOR OF THE LIGHT COMPANY. The record, in accordance with the praecipe (transcript, pages 210-211), contains all the papers in the case (except the receiver's bond and the order fixing his compensation), and all the minute entries, and no such judgment is shown. Nor did the Light Company pray for the payment of its claim nor that the income be impounded for its benefit.

The Light and Transit Companies were the sole parties before the court for over fifteen months and, although demand was made by the bondholders twenty-one months prior thereto, the Trustee took no action — until after appellant intervened. Then it prayed that the lien of the deed of trust be declared prior to all other liens on all the property of the Transit Company, including the net income in the hands of the receiver, and that the court hold this fund and all subsequently acquired earnings to apply on the mortgage indebtedness (transcript, page 101). It did not ask, nor has it ever asked for a foreclosure of the mortgage, or a sale of the property. It would seem that the only creditor who desires any payment from the debtor is appellant.

And throughout the teamwork of the "allies" (we

but borrow their own characterization) has been excellent. The Transit Company (an adverse claimant) and the Light Company joined with the Trustee in requesting that its lien be declared prior to all others (transcript, pages 107-108, 125). Neither of the first two companies thought it worth while to file any answer to the Trustee's petition, and when the suggestion of paving between the rails was broached, we find all three again unanimous.

Conceding, but not admitting, that the original proceeding was proper, what can be the purpose of continuing this receivership?

Is it to collect the Light Company's account? That company never took judgment, never asked that the income be impounded for its benefit, expressly averred that the Trustee had a lien on the property and income prior to its own, never asked for a sale of the property to satisfy its claim, and now prays that a fund that might be used in reducing claims prior to its own be used for paving. There is nothing to indicate that this is the object.

Is it to collect the money due the bondholders? It is now over fifteen years since default was made, and the right of foreclosure has rested with the Trustee and bondholders continuously during that period. It is now over fifteen years since the bondholders have received one cent on their bonds. The receivership has continued for three years. Yet up to the present

no foreclosure has been asked, and foreclosure is the only procedure permitted under the statutes of Arizona:

> 4113. All mortgages of real property and all deeds of trust in the nature of mortgages shall, notwithstanding any provision contained in the mortgage, be foreclosed by action in a Court of competent jurisdiction. Revised Statutes of Arizona, 1913.

It cannot be that they hope to pay off the indebtedness from the income. This indebtedness is about $90,000.00 now and increasing at the rate of $6,800.00 per year. The income is totally inadequate for this purpose.

Is it to prevent dismemberment by creditors? There are no creditors but the Trustee, Light Company and appellant. And there are more than sufficient funds now on hand to pay appellant. She could have been paid, and that danger obviated, long ago if they were acting in good faith.

Is it to prevent waste and mismanagement? There is no allegation or suggestion of wasteful or improvident management.

As far as objective is concerned this receivership could go on *ad infinitum* and accomplish no good; unless the non-payment of appellant's judgment be considered a "good."

We respectfully submit that the plan and purpose of this receivership is exactly what we stated at the beginning of this argument and should not be tolerated. The courts have frequently, and forcibly, expressed themselves as to situations similar to this one:

> The process of the court has not been used in good faith to collect complainant's judgment, but as a means of placing the property and business of the defendant railroad company in the hands of the court to be managed through a receiver, to the end that the defendant may not be subjected to suits in the ordinary course of judicial proceedings, and in order to enable the plaintiff and defendant, by agreement between them, through the receiver to apply all the earnings of the road during a series of years to the improvement and betterment of the property. * * * In short, the complainant and defendant have sought to make use of this court as an instrument to carry on, through the hands of a receiver, the important business of the defendant corporation; and this, not for the purpose, in good faith, of enforcing the confessed judgment set out in the bill but for the purpose of protecting the property of defendant from seizure on legal process, while the earnings are applied to the improvement of the road. In other words, the court is asked to stand between the company and its creditors, while the company is engaged in using the earnings, not to pay its debts, but to improve its property.

It is said that this policy is best for the company and its creditors. Whether this be so is for the company and its creditors to determine; it is not for the court to engage in the operation of a railroad through a receiver, because the interests of the parties concerned may be thereby advanced. It does not appear that any suit has been commenced to foreclose either of the mortgages on the road. *Sage vs. Memphis & L. R. R. Co.,* 18 Fed. 571.

Petitioner desires that steps should be taken to pay its claim. It contends that this court should not appoint a receiver simply "to hinder and delay creditors." That seems to have been the only object that has thus far been accomplished by the appointment of the receiver. * * * Neither the appointment of a receiver, nor the issuance of an injunction should be sustained where it is apparent or left in doubt, as to whether or not they were obtained for any other purpose than delay. *Cohen vs. Gold Creek Nevada Mining Co.,* 95 Fed. 580.

When a receiver has been appointed to hold property in which third persons have an interest, it is incumbent on the persons who have secured the appointment to prosecute the litigation effectively, and without unnecessary delay, and it is equally incumbent on a court which has acquired possession of property through the agency of a receiver to discharge it from judicial custody at the earliest practical moment, to the end that it may not be held in

such custody at the instance of one suitor or suitors to shelter it from the just claims of others. *Minot vs. Mastin,* 95 Fed. 734.

See also *Louisville Trust Co., vs. Louisville N. A. & C. R. Co.*, 174 U. S. 674, 43 L. Ed. 1130.

B. THE NET INCOME

Respective rights of the creditors to the funds in the hands of the receiver.

The fund we are discussing is the $8,768.77 in the hands of the receiver on April 1, 1920 — the date appellant filed her petition in intervention — and which represents the net income of the Transit Company after paying the costs and expenses of conducting its business (transcript, pages 42, 144).

(1) The Light Company: In discussing the equities we have practically disposed of this company's right to the fund. To briefly summarize, it is not a judgment creditor, it has never asserted any rights in, or priorities to, this fund nor do its pleadings entitle it to any. And these facts distinguish its position from Sage's in *Sage vs. Memphis & Little Rock R. R. Co.*, 125 U. S. 361, 31 L. Ed. 694. It has even specifically disclaimed any priority, or lien, and prayed that the Court so decree (transcript, pages 107-108).

(2) Trustee: It has been repeatedly held that the mortgagee is not entitled to the rents and profits of the

mortgaged property until he takes actual possession, or until possession is taken in his behalf by a receiver, or until in proper form, he demands and is refused possession. And that any action the mortgagee may take can have no retroactive effect on rents and profits earned prior to such action:

American Bridge Co. vs. Heidelbach, et al., 94 U. S. 798, 24 L. Ed. 144; *U. S. Trust Co. vs. Wabash Western Co.,* 150 U. S. 287, 37 L. Ed. 1085; *Dow vs Memphis & Little Rock R. R. Co.,* 124 U. S. 652, 31 L. Ed. 565; *Sage vs. Memphis & Little Rock R. R. Co.,* 125 U. S. 361, 31 L. Ed. 694. *Friedman S. & T. Co. vs. Shepherd,* 127 U. S. 494, 32 L. Ed. 163; *Gilman et al. vs. Telegraph Co.,* 91 U. S. 603, 23 L. Ed. 405; *Hook vs. Bosworth,* 64 Fed. 443; *Veatch et al. vs. American Loan & Trust Co., et al.,* 79 Fed. 471; *Teal vs. Walker,* 111 U. S. 242, 28 L. Ed. 415.

(3) Appellant: While the law required the trustees to impound income and gives him no lien on income earned prior to such impounding, this is not true of a statutory lien. It attaches to all property as received and is subject only to prior liens, and in this instance there were no prior liens.

It was argued by appellees in the court below that appellant had no lien on this specific fund until some action was taken by her to "fix" her lien, such as a levy of execution, and the learned judge of the district court

was evidently of this opinion because in his memo opinion he says (transcript, page 175):

> I think it clear that neither of the intervenors had any lien on the money in the hands of the Receiver merely because they had a lien on the real and personal property of the Transit Company, and neither had any right to the money until a petition was filed herein praying that same be impounded for the payment of such liens.

But, in *Thomas vs. Cincinnati, N. O. & T. P. Ry. Co.*, 91 Fed. 202, Taft, Circuit Judge, disposes of this contention:

> It is argued that neither the eleventh section of the Kentucky Enabling Act of February 13, 1872, nor the general Tennessee Railroad Act of March 24, 1877 (upon which the judgment creditors of Kentucky and Tennessee found their claim of priority, and which I have set forth and discussed in an opinion filed today 91 Fed. 105) upon the master's report, secures to the judgment creditors of the class therein favored any specific lien; that these acts only invalidate or postpone mortgage priorities asserted; and that, when no mortgage priority is asserted, then there is nothing upon which such judgments may be preferred to other claims, whether in judgment or not. IT IS FURTHER CONTENDED THAT THE BENEFIT SECURED TO JUDGMENTS OF THE FAV-

ORED CLASS BY THESE ACTS IS ONLY TO BE ENJOYED AFTER SUCH JUDGMENTS HAVE BEEN MADE EFFECTIVE LIENS BY THE LEVY OF EXECUTION AND THAT NOT UNTIL THEN CAN MORTGAGES AND OTHER CREDITORS BE POSTPONED TO SUCH JUDGMENTS.

At the hearing I was much impressed with the weight of these suggestions, and was inclined to order an equal distribution. I was the more persuaded of the correctness of these arguments because the court of appeals of this circuit had expressly decided that the Tennessee act of March 24, 1877 (and the Kentucky act is quite similar in this respect), does not give to judgments of the favored class such a lien, attaching to the property of the railroad company, as to follow it into the hands of a grantee for value without notice. *Railroad Company vs. Evans,* 31 U. S. App. 432, 14 C. C. A. 116, and 66 Fed. 809; *Guarantee Co. vs. Hoffstetter,* 29 C. C. A. 35, 85 Fed. 75. On careful reflection I am convinced that my first impression was wrong, and that the judgments favored by the Kentucky and Tennessee laws must be first paid in full out of this net earning fund. There is nothing in the decision of the court of appeals referred to from which it is to be inferred that the priority over mortgage liens accorded to such judgments may not operate in the distribution of the assets of a rail-

way corporation upon a general creditors bill, in which such judgments and mortgage debts are both set up with precisely the same effect as if the statute had given a specific lien. But for this general creditors' bill, these judgments in Tennessee might have been enforced by execution and sale of the rolling stock in that state, and if the rolling stock did not suffice, then by execution and sale of so much of the leasehold interest as has a situs there; and such sales would have been free from any mortgage or other lien of the trustee for rent. * * *

Now, a creditors' bill is merely an equitable levy and execution, for the benefit of all creditors, secured and unsecured, and the question of priority is to be settled in the same manner as if execution at law had been levied, at precisely the same time, as upon judgments duly rendered, for all claims found by the court to be just. By such an equitable levy and execution as the filing of this bill and the seizure of the property, therefore, the judgments in Tennessee and Kentucky of the favored class are given a priority, very like that of a senior lien, over the trustee's lien, upon the property of the defendant company in those states, and the trustees have a lien prior to the lien of all the other creditors. The surplus of earnings from the operation of the railroad property, over and above the cost of operating, belongs to the creditors for whose benefit the creditors' bill has been filed, in the same

> order of priority as must be preserved upon principles of equity in the distribution of the proceeds of the property operated upon sale. This must be so. Otherwise the operation of the property could not be for the equal benefit of all creditors.

Of necessity this must be so. The Arizona statute says: "A judgment * * * * shall be a lien * * * * on the property" of the judgment debtor.

The position taken by the appellee companies in the lower court that this lien has to be "fixed" by levy, attachment or garnishment, would work an absurdity, and would distort the statutes to read: "A judgment * * * shall be a lien * * * * on the property" of the judgment debtor "when it becomes a lien by being made a lien by some legal process that in and of itself creates a lien." And it might consistently conclude "and this statute means nothing."

The policy of the law that says to a mortgagee "Although you may have a pledge of the rents and incomes, nevertheless as you have voluntarily permitted the pledger to use them and secure credit thereby, you may not now be heard to object to their use to pay obligations, and your lien does not attach to prior earnings," does not apply to any other obligation or debt and especially a judgment lien. There is no such tacit understanding between the debtor and judgment creditor.

And that statutory liens will be recognized in receivership proceedings has been universally held.

In *Wiswall vs. Sampson,* 14 Howard 52, 14 L. Ed. 322, the court quoted with approval from Codewise V. Gelston, 10 J. R. 521:

> Chancellor Kent, in delivering the opinion of the court in Codewise V. Gelston, as Chief Justice, observed, "That if a fund for the payment of debts be created under an order or decree in chancery, and the creditors come in to avail themselves of it, the rule of equity then is, that they shall be paid *in pari passu*, or upon a footing of equality. But when the law gives priority, equity will not destroy it, and especially when legal assets are created by statute, as in case of a judgment lien, they remain so, though the creditors be obliged to go into equity for assistance. The legal priority will be protected and preserved in chancery."

Booth vs. Clark, 17 Howard 322, 15 L. Ed. 164:

> A receiver is an indifferent person between parties appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. Wyatt's Prac. Reg. 355. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all the parties, and not of the complainant or defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands

is in *custodia legis* for whomever can make out a title to it.

Fosdick vs. Schall, 9 Otto 235, 25 L. Ed. 339:

> The possession taken by the receiver is only that of the court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the principle it would if no change of possession had taken place.

To the same effect as above is *Quincy M. & P. R. Co,. vs. Humphreys,* 145 U. S. 82, 36 L. Ed. 632. 1, c, 637.

See also *Commonwealth Roofing Company vs. North American Trust Company,* 135 Fed. 984.

The Trustees having no lien on this fund, it is immaterial whether the fund be considered as realty or personalty. In either case appellant's lien was prior.

Nor should appellant's claim be defeated even though she had no statutory lien. At the time she filed her petition in intervention she was a judgment creditor and the only judgment creditor. The Company, by its receiver, held over $8,000.00 net income. This money had not been impounded by the Light Company for its benefit, nor requested by it. Appellant's petition was an equitable levy under and by virtue of her judgment.

Sage vs. Memphis & L. R. R. R. Co., supra (Supreme Court citation);

Hook vs. Bosworth, 64 Fed. 443.

Veatch, et al. vs. Am. Loan & Tr. Co., et al., 79 Fed. 471.

The Light Company, as we have shown, having eliminated itself, the only contenders remaining are Trustee and appellant. As to the rights of these two creditors a pertinent case is *American Bridge Company vs. Heidelbach,* 94 U. S. 798, 24 L. Ed. 144. It is short and may be quoted in its entirety:

> "The controversy in this case has arisen out of a mortgage executed by the Kansas and Missouri Bridge Company to the appellees as trustees, to secure the payment of principal and interest of certain bonds issued by the mortagor and described in the mortgage.
>
> Besides the bridge of the Company the mortgage included "the rents, issues and profits of said bridge, as far as the same are not required to pay the necessary expenses of keeping in repair and operating said bridge, which rents, issues and profits," it was declared, "are hereby pledged to the payment of said interest as it matures, and to the establisment of a sinking fund for the redemption and payment of the principal of said bonds," etc. It was further provided, that if the interest were in default for six

months, the trustees, upon the written request of the holders of one half of the outstanding bonds, might take possession of the mortgaged premises, manage and operate the bridge, and receive and collect all rents and claims due and to become due to the company.

The interest upon the bonds being in default, the trustees, on the 25th day of November, 1874, filed their bill, wherein, among other things, they set forth that there was in the hands of the Company a certain amount of money which ought to be applied upon the mortgage and certain claims due to the Company, the proceeds of which ought to be applied in like manner. The bill prayed accordingly.

The appellant, the American Bridge Company, held a judgment for $15,435.88 and costs against the Kansas and Missouri Bridge Company, upon which execution had been returned, *nulla bona*. On the 11th of December, 1874, the judgment creditor filed a bill claiming priority of payment out of the money and the proceeds of the claim above mentioned. It appears that there is a sufficient fund to meet the demand awaiting below the termination of this litigation.

It cannot be denied that the return of the execution, the filing of the bill, and the service of process, gave the judgment creditor a lien upon the fund in question which must prevail, unless the

mortgagees have shown a paramount right to it. *Miller vs. Sherry,* 2 Wall, 249 (69 U. S. XVII, 830); 2 Barb. Ch. Pr., 2d rev. ed., 157, n. 13. The question as to the right claimed by the trustees is conclusively settled against them by *R. R. Co. vs Cowdrey,* 11 Wall. 459 (78 U. S. XX., 199); and *Gillman vs. Telegraph Co.,* 91 U. S. 603 (XXIII), 405.

Both these cases, as regards this point, present exactly the same legal aspect as the case before us. It is unnecessary to reproduce at length what was said in those adjudications.

In this case, upon the default which occurred, the mortgagees had the option to take personal possession of the mortgaged premises, or to file a bill, have a receiver appointed, and possession delivered to him. In either case, the income thereafter would have been theirs. Until one or the other was done, the mortgagor, as Lord Mansfield said in *Chinnery vs. Blackman,* 3 Doug. 991, was "owner to all the world, and entitled to all the profit made."

The mortgage could have no retrospective effect as to previous income and earnings. The bill of the trustees does not effect the rights of the parties. It was an attempt to extend the mortgage to what it cannot be made to reach. Such a proceeding does not create any new right. It can only enforce those which exist already. The bill of the trustees is as

ineffectual as if the fund were any other property, real, personal or mixed, acquired by the mortgagee aliunde, and never within the scope of the mortgage."

It is true that no execution was issued in the present case and no *nulla bona* return had. But as the order appointing the receiver gave him possession of "all of the property and assets of every kind and description" of the Transit Company, execution would be obviously futile, and would have been, as the court said in *Sage vs. Memphis & Little Rock Ry. Co., supra* (Supreme Court decision), "an idle ceremony."

> In the present case, it is true, Sage did not sue out execution on his judgment and have a return of *nulla bona*. But that point has become immaterial. The railroad company made no such objection at the time the Receiver was appointed. BESIDES, SUING OUT AN EXECUTION WOULD, ACCORDING TO THE FACTS AND ADMISSIONS OF THE PARTIES, HAVE BEEN AN IDLE CEREMONY. *Sage vs. Memphis & Little Rock Ry. Co., supra.*

Moreover, in the present case the Light Company, without objection, secured the appointment of a receiver without either judgment or issue of execution.

The learned District Judge treated appellant's petition as one to impound future income. But appellant's

petition specifically set up that this income was in the hands of the receiver, that she had the prior right thereto, and prayed for "immediate payment" of the amount due her.

2. *Diversion of the fund to paving.*

But the Light Company, Trustee and Transit Company contend that this fund should be used for paving, to protect the company's franchise from forfeiture.

It goes without saying that the city cannot, even if it would, declare any forfeiture of the company's franchise while it is in the hands of the receiver. Any such action on the City's part would not only be ineffectual, but an attempt to enforce it would be a gross contempt of court. *Royal Trust Co. vs. Washburn B. & I. Ry. Co.,* 113 Fed. 531. It follows that THE FRANCHISE THESE THREE ARE ATTEMPTING TO PRESERVE IS THE FRANCHISE THE COMPANY WILL HAVE AFTER THE RECEIVERSHIP PROCEEDINGS ARE TERMINATED, and they are attempting to do it with money due appellant. Whether Stone Avenue is paved or not paved cannot effect the court's operation of the road thru the receiver.

If the city desires the company to pave between its tracks, the proper step would be for the city to intervene and ask that this be done. Then whether or not the Transit company was legally required to take such

a step could be looked into and determined. This the city has not seen fit to do, and it does not lie with the Trustee, Light Company and Transit Company to seek the enforcement of an undetermined, unadjudicated claim of a third party who apparently has so little interest in its claim, or so faint a belief in the strength of its contention that it does not care to advance it in its own right.

Nor can we agree that the Transit Company, or the other two creditors, have any right to use money held for the payment of creditors to preserve its franchise or, as the Transit company naively puts it, "enhance the value of the Trustee's security", even had the city power to forfeit the receiver's franchise. *Spackman vs. Swan Creek Orchard Co.*, 274 Fed. 107. THIS MONEY IS THE CREDITORS' MONEY AND IS NOT SUBJECT TO THE IMPROVEMENT OF THE PROPERTY, THE ENHANCEMENT OF THE TRUSTEE'S SECURITY, NOR MAY IT BE USED TO PREVENT A FORFEITURE OF THE FRANCHISE. Quoting again from the opinion rendered by Taft, Circuit Judge, in *Thomas vs. Cincinnati N. O. & T. P. Ry. Co., supra,* we find:

> But it is urged that the rental had to be paid to prevent a forfeiture of the lease to the trustees and the city; that, but for this, no net earning would have been earned, and therefore the rental paid inured to the benefit of the judgment credi-

> tors of Kentucky and Tennessee. Those creditors could have enforced their claims against the rolling stock whenever the trustees attempted to forfeit the leasehold and sell the rolling stock. They would not have been harmed by such a proceeding, because, by a separate sale of the rolling stock, they could have been certainly paid in full. They have not moved the court to sell the rolling stock separate from the leasehold, as they might have done long ago; and now, when, by reason of their forbearance, the trustees have received their rent in full, and enough money has been earned to pay them in full, they, WHO MIGHT HAVE INSISTED ON PAYMENT OUT OF THE FIRST NET EARNINGS, going to make up the great fund of $6,000,000.00 since earned MUST BE PAID.

If, in the above case, the judgment debtors were entitled to payment out of the first net earnings despite the danger of the forfeiture of the lease, why is not appellant entitled to payment out of the first net earnings?

Moreover, the reports of the receiver show a steady increase in the net income. The last report, filed April 4, 1921, shows that there was in the receiver's hands on that date, the sum of $11,756.19 (transcript, page 149). The estimated cost of paving is $8,000.00 (transcript, page 106). At this rate of increase appellant's claim

could be paid, the greater part of the cost of paving, if not all, paid in cash, and receiver's certificate issued for the balance.

In conclusion we earnestly and respectfully urge that by reason of the law and the equities, the order of the lower court should be reversed and that the District Court should be ordered to enter a decree directing the payment to appellant Asma Rubiaz as prayed for in her intervening petition filed in this action.

Respectfully submitted,

Richey & Richey

Of Tucson, Arizona

Mann & Brawley

Of Tucson, Arizona.

Attorneys for Appellant Asma Rubiaz.